DEC 15 197
MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 19___

No. 72-881

LOUIE L. WAINWRIGHT, Director,
Division of Corrections,
State of Florida,

Petitioner,

-vs-

HARVEY D. ARRANT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ROBERT L. SHEVIN
Attorney General

P. A. PACYNA
Assistant Attorney General
419 Stovall Professional Building
305 Morgan Street
Tampa, Florida 33602

Counsel for Petitioner

RESPONSE NOT PRINTED

TOPICAL INDEX TO BRIEF

	Page
PRELIMINARY STATEMENT	1-2
OPINIONS BELOW	2-3
THE JUDGMENTS	3
JURISDICTION	3
QUESTION PRESENTED	3
STATUTES INVOLVED	4
STATEMENT OF THE CASE	4-6
ARGUMENT	7-14
CONCLUSION	14-16

TABLE OF CITATIONS

CASE:	PAGE:
Arrant v. State, 234 So.2d 167	2
Barker v. Wingo, 1972, ___ U.S. ___, 33 L.Ed. 2d 101, 92 S.Ct. ___	7, 8
Beavers v. Haubert, 1905, 198 U.S. 77, 49 L.Ed. 950, 25 S.Ct. 573	7, 9

CASE:	PAGE:
Dickey v. Florida, 1970, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26	11, 13
Pollard v. United States, 1957, 352 U.S. 354, 1 L.Ed.2d 393, 77 S.Ct. 481	7
Smith v. Hooey, 1969, 393 U.S. 374, 21 L.Ed. 2d 607, 89 S.Ct. 575	10
Taylor v. Taintor, 16 Wall. 366, 21 L.Ed. 287	8
United States v. Marion, ___ U.S. ___, 30 L.Ed. 2d 468, 92 S.Ct. ___	13
Woodward v. Edwards, 1971, 244 So.2d 438	7
STATUTES	
FLORIDA STATUTES:	
Section 26.10	4
Section 26.30	4
Chapter 915	4
Section 915.01(2)	4
FEDERAL:	
28 U.S.C., Section 1254(1)	3

IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 19 __

No. _____

LOUIE L. WAINWRIGHT, Director,
Division of Corrections,
State of Florida,

Petitioner,

-vs-

HARVEY D. ARRANT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PRELIMINARY STATEMENT

Louie L. Wainwright, Director, Division of Corrections, State of Florida Department of Health and Rehabilitative Services, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered October 24, 1972; petition for rehearing denied November

15, 1972, also sought to be reviewed.

OPINIONS BELOW

The initial opinion of the United States District Court, Middle District of Florida, Orlando Division, in Case No. 71-105-ORL-CIV., *Harvey D. Arrant vs. Louie L. Wainwright*, Director, Division of Corrections, State of Florida Department of Health and Rehabilitative Services, was filed March 28, 1972, and is unreported. The judgment of the state trial court was affirmed in *Arrant v. State*, 234 So.2d 167 (DCA 4 1970).

Appendix I is the opinion of the District Court of Appeal of Florida, Fourth District, as reported in 234 So. 2d 167; Appendix II opinion of the United States District Court, Middle District of Florida, Orlando Division, in Case No. 71-105-ORL-CIV., denying the petition for writ of habeas corpus; Appendix III portions of the transcript of testimony before the United States District Court, Middle District of Florida, Orlando Division, in Case No. 71-105-ORL-CIV., *Harvey D. Arrant vs. Louie L. Wainwright*, Director, etc., et al.; Appendix IV opinion of the United States Court of Appeals for the Fifth Circuit in Case No. 72-2207, *Arrant v. Wainwright;* the petition for rehearing and order denying same dated seriatim October 24, 1972, November 6,

1972, and November 15, 1972.

THE JUDGMENTS

The judgment of the United States Court of Appeals for the Fifth Circuit was dated October 24, 1972, and order denying petition for rehearing November 15, 1972.

JURISDICTION

The jurisdiction of this Court to enter the writ of certiorari is invoked pursuant to 28 U.S.C., § 1254(1).

QUESTION PRESENTED

DOES THE SIXTH AMENDMENT RIGHT TO SPEEDY TRIAL UNDER THE UNITED STATES CONSTITUTION AFFORD SPECIAL CONSIDERATION TO STATE PROSECUTION AGAINST A DEFENDANT FREE ON BAIL AFTER INDICTMENT WHO THEN VIOLATES FEDERAL LAW RESULTING IN FEDERAL INCARCERATION AND WHO LATER IS TRIED AND CONVICTED ON STATE CHARGES WHILE STILL SERVING IN FEDERAL PRISON?

STATUTES INVOLVED

Chapter 915, Florida Statutes 1967, specifically Section 915.01(2), as to speedy trials; Sections 26.10 and 26.30 relating to the Ninth Judicial Circuit of Florida and terms of court therein as of 1967, the pertinent period vis-a-vis this case.

STATEMENT OF THE CASE

Respondent Arrant was arrested on February 25, 1967, and charged with killing Kenneth Benson on January 12, 1967. A plea of not guilty was entered on March 2, 1967, at arraignment and the Orange County, Florida, grand jury returned an indictment against respondent on March 30, 1967, charging respondent with murder in the first degree and on May 1, 1967, respondent Arrant was released on a $2500 bond. On or about Christmas of 1967, respondent Arrant was arrested in Florida as an ex-felon being in possession of a firearm and admitted to bail and in the interim between that date and June of 1968, respondent Arrant was arrested and tried in Dothan, Alabama, for the federal crime of being in possession of illegal untaxed moonshine whiskey. Respondent Arrant was incarcerated in the federal penitentiary in Atlanta, Georgia, on or about June 4, 1968, and by writ of habeas corpus ad prosequendum while respondent Arrant was

serving his federal term, he was transferred from federal penitentiary in Atlanta for trial in Florida on March 17, 18, and 19, 1969.

Respondent Arrant in Florida was found guilty of murder in the first degree with recommendation of mercy and sentenced to imprisonment for life and following the verdict, was returned to the federal penitentiary in Atlanta to serve the remainder of his sentence after which he was then transported to Florida State Penitentiary at Raiford, Florida.

Respondent Arrant on January 5, 1968, February 6, 1968, March 7, 1968, and October 1, 1968, filed motions requesting a trial allegedly pursuant to Chapter 915, Florida Statutes 1967.

March 11, 1969, respondent Arrant filed a motion to dismiss charges on the ground he was denied his right to speedy trial pursuant to the Sixth Amendment of the United States Constitution, Section 11 of the Declaration of Rights of the Florida Constitution, and Section 916.01, Florida Statutes; overruled March 13, 1969.

To recapitulate, respondent Arrant was indicted on March 30, 1967; released on bail May 1, 1967; again arrested Christmas 1967 and admitted to bail; arrested on the federal charge prior to June 4, 1968; committed to federal penitentiary from June 4, 1968, until his trial in March of 1969 and thereafter.

As Orange County, Florida, Circuit Court holds two terms of court per year with Spring term beginning in April and the Fall term in October, it is clear demands were not in accordance with Chapter 915, Florida Statutes 1967, because there must have been three successive demands for trial during three successive terms of court after the date first committed.

The January 5, 1968, motion was filed in the Fall term of 1967; motion for trial February 6, 1968, also in the Fall term of 1967. There was no demand for Spring term until October 1, 1968, which therefore meant respondent Arrant filed written demands only in Fall term of 1967 and Spring term of 1968 with the trial being set for the Fall term of 1968 since terms of court begin in the Fall term on the third Monday in October running to the first Monday in April.

The federal district court determined respondent Arrant did not comply with requirements of Chapter 915, Florida Statutes 1967, and the Florida state court rightfully found respondent Arrant could not invoke benefits of its provisions.

Respondent Arrant does not deny he was incarcerated in federal penitentiary between June of 1968 and March of 1969 when he went to trial on the Florida state court charge of murder.

ARGUMENT

This Honorable Court has continued to recognize the right to speedy trial is necessarily relative; consistent with delays, and depends upon circumstances. *Barker v. Wingo*, ___ U.S. ___, 33 L.Ed. 2d 101, 92 S.Ct. ___ (1972); *Beavers v. Haubert*, 198 U.S. 77, 49 L.Ed. 950, 25 S. Ct. 573 (1905).

In *Pollard v. United States*, 352 U.S. 354, 1 L.Ed.2d 393, 77 S.Ct. 481 (1957), it was recognized whether delay in completing prosecution amounts to unconstitutional deprivation depends upon circumstances, and delay must not be purposeful or oppressive.

Florida recognized Chapter 915, Florida Statutes 1967 (not the present requirement), does not require a person be prepared for trial at the time he files his initial demand but it has been determined also that one who files demands for speedy trial cannot reasonably expect an instant trial. *Woodward v. Edwards*, 244 So.2d 438 (DCA 4 1971).

Since the decision sought to be reviewed anticipates the critical date to be October 16, 1967, it must be determined whether special consideration must be applied where, after the alleged critical date, respondent Arrant while on bail for the charge of murder was arrested again Christmas of 1967 on the charge of an ex-felon in possession of a firearm

and again admitted to bail departing the State of Florida for Alabama where he engaged in proscribed federal activities of being in possession of illegal untaxed moonshine whiskey for which he was tried after arrest on those federal charges in June of 1968 and placed in the federal prison.

While a defendant has no duty to bring himself to trial (*Barker v. Wingo*, supra, at page 115), special consideration should be given to the prosecution vis-a-vis the practical administration of justice.

Respondent Arrant had remained at liberty on bond under the murder charge since May of 1967 and, after being incarcerated in federal prison, his presence for the trial was secured under a writ of habeas corpus ad prosequendum directed to the Warden of the United States Penitentiary at Atlanta, Georgia, for trial on March 17, 18, and 19, 1969. This was after respondent Arrant had served eight months of his federal sentence which had not expired at the time of his state trial.

It can be seen that federal and state courts each claimed jurisdiction over the same person at the same time.

While it is not denied Florida jurisdiction had attached to respondent Arrant albeit he was under bail, that jurisdiction was exclusive in effect until it had wrought its function. *Taylor v. Taintor*,

16 Wall. 366, 370, 21 L.Ed. 287, 290.

As it was held in *Beavers*, supra:

"(2) Undoubtedly a defendant is entitled to a speedy trial and by a jury of the district where it is alleged the offense was committed. This is the injunction of the Constitution, but suppose he is charged with more than one crime, to which does the right attach? He may be guilty of none of them, he may be guilty of all. He cannot be tried for all at the same time, and his rights must be considered with regard to the practical administration of justice. To what offense does the right of the defendant attach? To that which was first charged, or to that which was first committed? Or may the degree of the crimes be considered? Appellant seems to contend that the right attaches and becomes fixed to the first accusation, and, whatever be the demands of public justice, they must wait. We do not think the right is so unqualified and absolute. If it is of that character, it determines the order of trial of indictments in the same court. Counsel would not so contend at the oral argument, but such manifestly is the consequence. It must be remembered that the right is a constitutional one, and, if it has any application to the order of trials of different indictments, it must

> relate to the time of trial, not to the place of trial. The place of trial depends upon other considerations. It must be in the district where the crime was committed. There is no other injunction or condition, and it cannot be complicated by rights having no connection with it. The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice. It cannot be claimed for one offense and prevent arrest for other offenses; and removal proceedings are but process for arrest,— means of bringing a defendant to trial." (p. 954 of 49 L. Ed.)

Within this decade, this Honorable Court in *Smith v. Hooey*, 393 U.S. 374, 21 L.Ed.2d 607, 89 S.Ct. 575 (1969), opined that these special circumstances and special considerations required the prosecution as was accomplished in the case sub judice to secure the presence of a federal prisoner for a state trial and therefore, after respondent Arrant was federally incarcerated and made a demand on September 30, 1968, which was in the Spring term for Orange County, Florida, he was placed on trial during the very next term of court which comports with the mandate of this Honorable Court in *Smith*, supra:

> "By a parity of reasoning we hold today that the Sixth Amendment right to a speedy trial may not be dispensed with so lightly either. Upon the petitioner's demand, Texas had a constitutional duty to make a diligent, good-faith effort to bring him before the Harris County court for trial." (text 614 of 21 L.Ed.2d)

The delay of the magnitude or consequence of that involved in *Dickey v. Florida*, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970), is clearly not to be found in this cause and, therefore, neither Sixth nor Fourteenth Amendment rights of respondent Arrant were violated.

In *Dickey*, there was clearly present an inordinate delay but there was also a strong independent showing of prejudice from the death and unavailability of witnesses and in the instant case, the United States District Court opined:

> "Under the circumstances it is apparent that the delay did not prevent Mary from testifying for the petitioner at the trial. Even if the case would have been tried when it was first set, that is, one and one-half months after the petitioner's arrest, it would have been possible to impeach Mary's testimony with two prior inconsistent sworn statements, whichever way she chose to testify. Mary

had simply spun such a tangled web of prior statements that she could not risk testifying, and the delay did not materially improve or worsen the situation.

Petitioner contends that he was prejudiced by virtue of the fact that Edwards died in the period of time between his arrest and the trial. This contention is totally without merit. Edwards lay gravely wounded at the time the murder indictment was returned against the petitioner and he died some two weeks after petitioner's arrest. Therefore, the period of delay in bringing the case to trial had no effect on the availability of Edwards.

Petitioner's final contention is that the passage of time between his arrest and trial caused Padgett's memory to fade concerning the events which occurred on the night of January 11, 1967. Padgett was called as a State's witness at the trial. He testified with clarity concerning some of the events but stated he couldn't remember others because 'it had been too long'.

The trial judge ruled that Padgett was a hostile witness and permitted the state to cross-examine him, at which point he invoked the Fifth Amendment and the questioning

was concluded. It appears that the witness' loss of memory was a result of convenience rather than the passage of time between petitioner's arrest and trial, and we are unable to find prejudice on this ground.

In light of all the foregoing facts it must be concluded that the petitioner was not prejudiced by the inordinate delay which occurred in the bringing of his case to trial, and that he was not denied the right to a speedy trial on the murder charge of which he now stands convicted."

Furthermore, *Dickey*, supra, does not adopt the rule that an inordinately long delay between the lodging and the formal charge and the trial is per se prejudicial.

Mr. Justice Brennan's concurring opinion in *Dickey*, supra, as cited in the separate opinion of Mr. Justice Douglas, Mr. Justice Brennan and Mr. Justice Marshall in *United States v. Marion*, ___U.S. ___, 30 L.Ed.2d 468, 486, 92 S.Ct. ___, designates legitimacy of governmental delay involved in the instant case.

"When is governmental delay reasonable? Clearly, a deliberate attempt by the government to use delay to harm the accused, or governmental delay that is 'purposeful or oppressive,' is unjustifiable.

Pollard v. United States, supra, at 361, 1 L Ed 2d at 399. See also United States v. Provoo, supra. The same may be true of any governmental delay that is unnecessary, whether intentional or negligent in origin. A negligent failure by the government to ensure speedy trial is virtually as damaging to the interests protected by the right as an intentional failure; when negligence is the cause, the only interest necessarily unaffected is our common concern to prevent deliberate misuse of the criminal process by public officials. Thus the crucial question in determining the legitimacy of governmental delay may be whether it might reasonably have been avoided —whether it was unnecessary. To determine the necessity for governmental delay, it would seem important to consider, on the one hand, the intrinsic importance of reason for the delay, and, on the other, the length of the delay and its potential for prejudice to interests protected by the speedy-trial safeguard. For a trivial objective, almost any delay could be reasonably avoided. Similarly, lengthy delay, even in the interest of realizing an important objective, would be suspect." (text 40 of 26 L.Ed.2d)

CONCLUSION

Endeavors of petitioner point the way to practical administration of justice in

that special consideration must be given when there is no deliberate attempt to use delay to harm the accused. As clearly outlined herein, there was no negligent failure by Florida to prevent a speedy trial. Respondent Arrant was free on Florida bail during the time he was incarcerated for a federal offense in a federal prison and Florida implemented its constitutional duty to return respondent Arrant to Florida for trial during his federal incarceration; therefore, respondent Arrant's Sixth Amendment right to a speedy trial was unimpaired.

It is for the aforesaid reasons petitioner prays this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in the premises.

Respectfully submitted,

LOUIE L. WAINWRIGHT
Director, Division of
Corrections, State of
Florida

Petitioner

ROBERT L. SHEVIN
Attorney General

P. A. PACYNA
Assistant Attorney
General

Counsel for Petitioner

PROOF OF SERVICE

This is to certify that I have forwarded three copies of the foregoing Petition for Writ of Certiorari tc James L. Padgett, of Davis, Asbury & Padgett, counsel for respondent Harvey D. Arrant, P. O. Box 627, Crescent City, Florida, by mail, this _____ day of December, 1972.

P. A. PACYNA
Assistant Attorney General

Of Counsel for Petitioner

ADDITIONAL PROOF OF SERVICE

This is to certify that I have forwarded three copies of the foregoing Petition for Writ of Certiorari, which includes an additional appendix page,

i.e., Appendix 42, to James L. Padgett, of Davis, Asbury & Padgett, counsel for respondent Harvey D. Arrant, P. O. Box 627, Crescent City, Florida, by mail, this _____day of January, 1973.

_____
P. A. PACYNA
Assistant Attorney General

Of Counsel for Petitioner

APPENDIX I

Harvey D. ARRANT, Appellant,

v.

STATE of Florida, Appellee.

No. 69-324.

District Court of Appeal of Florida,
Fourth District.

April 8, 1970.

Rehearing Denied May 12, 1970.

Appeal from the Circuit Court for Orange County; Roger A. Barker, Judge.

Andrew A. Welch and Edward R. Kirkland, Orlando, for appellant.

Earl Faircloth, Atty. Gen., Tallahassee, and Charles W. Musgrove, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

We have reviewed the briefs and record on appeal. On the basis thereof, we are of the opinion that no harmful error has been demonstrated. The judgment appealed from is, therefore, affirmed.

Affirmed.

CROSS, C.J., and McCAIN and OWEN, JJ., concur.

A P P E N D I X II

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

HARVEY D. ARRANT,

Petitioner,

vs No. 71-105-Orl-Civil

LOUIE L. WAINWRIGHT, Director, Division of Correction, State of Florida, Department of Health and Rehabilitation Services,

Respondent

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, presently serving a life sentence in the Florida State Penitentiary at Raiford, Florida, has filed a Petition for Writ of Habeas Corpus alleging that he was denied the right to a speedy trial for the reason that he was indicted for first degree murder on March 30, 1967 and was not tried on the charge until March 17, 1969.

On January 20, 1972, this court found the petitioner had exhausted his state court remedies and"so far as the record reveals [he] was never admitted to bail, but remained incarcerated for the entire two years". Subsequent testimony taken

at the hearing of this cause as well as the state court record which was admitted as evidence therein clearly show that the petitioner remained at liberty on bail under the charge for all except approximately six weeks of the two year period between his arrest on the indictment and the trial.

The record reveals the following material facts: On January 11, 1967, petitioner, Mary Peak, Donald Edwards and Joe Padgett traveled from DeFuniak Springs, Walton County, Florida, to Orlando, Florida. Following their arrival in Orlando the four rented a room at the Log Cabin Motel, paying a week's rent in advance. The motel proprietress overheard them formulating a plan under which they would attempt to lure someone with at least $500.00 into a card game, and that if they failed, "Mary would have to step in * * * and talk [the person] into going some place".

Petitioner and Edwards then asked the motel keeper whether she knew anyone in the area with money. The two then gave her a deck of cards, which they said were marked, instructing her to return them when requested in order that no one would become suspicious of the cards to be used in the game. Petitioner and Edwards then promised to cut her in on any money they might make if she would locate someone to play cards with them.

The four then requested that the proprietress recommend an eating establish-

ment and she suggested the College Inn. Shortly thereafter, around 11:00 p.m., on the evening of January 11, 1967, petitioner, Mary and Edwards left the motel in petitioner's automobile and Padgett returned to the motel room.

Mary was next seen entering the College Inn, and seating herself alone at the bar. Petitioner and Edwards then entered and seated themselves at a nearby table.

One Kenneth Benson, a professional golfer in the Orlando area who was in the establishment with friends, subsequently approached Mary and sat with her at the bar. Shortly thereafter Mary and Benson left the College Inn and petitioner and Edwards followed.

Around 11:30 p.m., Mary and Benson entered Rogers Restaurant in Orlando where each ordered a drink. Petitioner and Edwards then entered the establishment and seated themselves apart from the couple. Less than an hour later Mary and Benson left and the two men hurriedly followed. Sometime during that same evening a bus boy at the restaurant observed two unidentified men standing in front of Benson's automobile in the restaurant parking lot.

Around 2:00 a.m., on the following morning petitioner, Edwards and Mary awoke Padgett at the motel, and told him that they were leaving for home. The four then drove back to DeFuniak Springs

stopping at a restaurant in Cross City, Florida where Padgett and Edwards were observed to have "quite a lot of money" in their possession.

On January 12, 1967, around 2:00 p.m., Benson's body was found in his car in an isolated lane area near the Log Cabin Motel. His death, which occurred at approximately 1:00 a.m., on that same morning, resulted from two bullet wounds, one in the left chest area and one in the right temple. A single $5.00 bill and a money clip were the only personal effects found on his body. The evidence indicates that shortly before his death Benson was observed to have had approximately $1,200.00 in cash on his person.

Around the end of January, 1967, in Walton County, Donald Edwards was shot and seriously wounded in an unrelated incident. Edwards subsequently died of his gunshot wounds after hospitalization for some 83 days. Petitioner was also shot in the same incident but his wounds were only superficial.

On February 24, 1967, Mary gave a sworn statement to the Orange County Solicitor and several other law enforcement officers, including John R. Bachman of the Orange County Sheriff's Department in which she implicated petitioner and Edwards in the killing of Benson.

On February 25, 1967, the petitioner was arrested under a warrant issued on the complaint of John R. Bachman charging

him with Benson's murder. Petitioner was arraigned on the charge on March 2, 1967, in the Justice of the Peace Court of Orange County, at which time he entered a plea of not guilty and was bound over to the Orange County Circuit Court.

An Orange County Grand Jury subsequently returned an indictment against the petitioner on March 30, 1967, in case No. 67-983 charging him with murder in the first degree in connection with Benson's death. Mary testified before the Grand Jury and again implicated petitioner in the killing. On that same day petitioner was arrested on the indictment and held without bond.

On March 31, 1967, petitioner was brought before the Orange County Circuit Court which found him to be indigent and set the trial of the case for May 8, 1967. On April 5, 1967 petitioner, represented by court-appointed counsel, was arraigned on the indictment and entered his plea of not guilty.

On April 13, 1967, about the time of Edwards' death, Mary gave a sworn statement to petitioner's attorney in which she exonerated petitioner and laid sole blame for the killing on Edwards. In that statement she swore that petitioner was not present when Benson's death occurred.

Shortly thereafter petitioner's attorney filed a petition for writ of habeas corpus in the Orange County Circuit

seeking to have petitioner released from custody under the charge. Hearing was held on the petition on May 1, 1967, and at that time Mary gave testimony exculpating petitioner of the crime. At the time of the hearing Edwards had died of his gunshot wounds. Pursuant to the habeas corpus petition the court set petitioner's bond at $2,500.00 and shortly thereafter he was released from custody under such bond.

On May 3, 1967, the State Attorney filed a Motion for Continuance of the May 8, 1967 trial setting, stating that the testimony of Mary at the hearing was in conflict with that given by her before the Grand Jury, and that she was a material witness in the State's case. The court continued trial of the case to June 12, 1967.

Thereafter, on January 5, 1968, February 6, 1968, March 7, 1968 and October 1, 1968 petitioner's attorney filed motions requesting a trial on the charge. A copy of each of these motions was served on the State Attorney but no action was ever taken on them.

On November 12, 1968 the petitioner's attorney filed a motion requesting that he be released from the appointment and that he be paid statutory fees and expenses for the services he had theretofore rendered in connection with the representation of the petitioner. Hearing was held upon the motion and on November

27, 1968 the court sustained the motion and discharged the attorney granting him fees and expenses. In that order the court stated in part:

> "[the] State Attorney for the Ninth Judicial Circuit, has announced that the State would be unable to successfully prosecute the defendant at the present time or in the reasonable foreseeable future* * *".

On January 19, 1969, a newly elected State Attorney filed Motion for Order Fixing Trial Date and pursuant to such motion the court set the case for trial the week of March 17, 1969. At that time the court also set aside its previous order discharging petitioner's attorney.

On February 11, 1969, a subpoena was issued from the Orange County Circuit Court commanding Mary to appear before the State Attorney in connection with the case. She was subsequently arrested on a charge of giving perjured testimony before the Orange County Grand Jury in March of 1967, concerning this case. Pursuant thereto she was incarcerated overnight in the Orange County Jail and informed that her bond would be set at $50,000.00.

On February 12, 1969, while in custody, Mary gave an affidavit to the State Attorney to the effect that her statement of February 24, 1967 given to the Orange County Solicitor and her testimony

before the Orange County Grand Jury in March of 1967 were true, and further that her statement to petitioner's attorney was false and made as a result of threats by the petitioner. Shortly after the giving of such affidavit she was released from custody under the perjury charge.

On March 11, 1969 petitioner's attorney filed Motion to Dismiss the charges on the grounds that the "defendant has been denied his right to a speedy trial pursuant to the Sixth Amendment of the United States Constitution, and Section 11 of the Declaration of Rights of Florida Constitution, and Section 916.01 of the Florida Statutes." The motion was overruled by the court on March 13, 1969.

Although petitioner had remained at liberty on bond under the murder charge since May of 1967, his presence for the trial was secured under a Writ of Habeas Corpus Ad Prosequendum directed to the Warden of the United States Penitentiary at Atlanta, Georgia, where he had been serving a federal sentence for the preceding eight months.

The trial was held on March 17, 18 and 19 in the Circuit Court of Orange County, Florida at the conclusion of which a jury found petitioner guilty of murder in the first degree with recommendation of mercy. As a result thereof petitioner was sentenced to a term of imprisonment for life.

On May 8, 1969, the petitioner filed Notice of Appeal in the District Court of Appeals, Fourth District of Florida, alleging among other grounds, that "* * * the Court erred in denying the defendant's motion to dismiss the indictment in that the defendant was denied a speedy trial under the Constitution of the State of Florida." The District Court of Appeals affirmed the judgment in Arrant v. State, 234 So. 2d 167 (D.C.A. 4, 1970).

The sole contention advanced by the petitioner in this proceeding is that he was denied the right to a speedy trial as guaranteed by the Sixth Amendment to the United States Constitution and the Constitution and Laws of the State of Florida.

Petitioner argues that the state trial court did not comply with Section 915.01(3) of the Florida Statutes which provides:

> "A person who has been released on bail may file a written demand for trial on the first day of each of three (3) successive terms of court, and if he is not brought to trial before the end of the third term, he shall be discharged from the crime."

Two terms of court per year are held in the Orange County Circuit Court. The Spring term begins on the first Monday in April and the Fall term begins on the

third Monday in October. §26.30 Florida Statutes.

The Florida courts have interpreted §915.01 to mean that the accused must by affirmative action embodied in a written document, demand trial in three successive full terms of court following his arrest in order to be afforded the provisions of the statute. Anderson v. Edwards, 234 So.2d 720 (D.C.A. 1970); Williams v. State, 208 So.2d 628 (D.C.A. 1968).

So far as the record reveals the petitioner did not object to any of the continuances requested by the State when the case was set for trial during the Spring and Fall 1967 terms of 1967. It was not until the final three months of the Fall 1967 term that petitioner filed three demands for trial. The case was not set for trial during the Spring 1968 term and he waited until the final 20 days of that term before filing his fourth demand.

Petitioner argues that no demand for trial was necessary under the statute in the Spring 1967 and Fall 1968 terms of court inasmuch as his case had been set for trial in those terms. As authority he cites Dickoff v. Dewell, 9 So. 2d 805 (Fla.Sup.Ct. 1942). It appears that the facts of the Dickoff case are distinguishable from those here presented in that there the petitioner had filed written demands for trial in three successive terms of court, and further

that he objected to each of the six continuances granted to the State.

We must conclude under the facts shown by the record now before us that the petitioner did not comply with the requirements of §915.01 and that the State court rightfully found that he could not invoke the benefits of its provisions.

The petitioner further contends that he was denied the right to a speedy trial as guaranteed under the Sixth Amendment to the United States Constitution, §11 of the declaration of Rights of the Florida Constitution (now Article 1 §16), and under §916.01 (now §918.015) of the Florida Statutes.

We will consider these contentions together inasmuch as the Florida courts have held that the right to a speedy trial in the state is collectively derived from all three of the above sources. Bird v. Stedman, 223 So.2d 85, (1969); Love v. State, 116 So. 240 (1928).

The factors which must be considered in deciding whether petitioner was denied a speedy trial are, (1) the length of the delay, (2) the reason for the delay, (3) the prejudice suffered by the petitioner, and (4) whether the petitioner has waived his right. United States v. Anerbach, 420 F.2d 921 (5th Cir. 1969). Petitioner candidly admits that actual prejudice must have resulted from the delay, whether it be his

burden to show such prejudice. United States v. King, 431 F.2d 734 (5th Cir. 1970); Finney v. Wainwright, 434 F.2d 1001 (5th Cir. 1970), or whether it be the burden of the State to show no prejudice. Hoskins v. Wainwright, 440 F.2d 69, (5th Cir. 1971); Murry v. Wainwright, 450 F.2d 465 (5th Cir. 1971).

At the hearing and in his brief petitioner advances the argument that the delay in bringing the case to trial caused Mary to refuse to testify, Edwards to be unavailable, and Padgett to have a lapse of memory. At the trial petitioner did not offer any testimony or produce any witnesses.

On January 26, 1971, some 22 months after the trial, Mary gave still another sworn statement this time to the effect that petitioner was innocent and that her statement to the State Attorney on February 12, 1969 was false and made as a result of promises and threats she received from state law enforcement authorities. The State's Attorney, and the officers mentioned in Mary's last statement testified at the hearing that no such promises or threats were ever made.

The record reveals that Mary has changed her testimony as to what transpired on the night of January 11, 1967 no less than three times. She has given three sworn statements incriminating petitioner and three exculpating him. At the time the case was tried she had

given three statements for the State and two for the petitioner.

At the trial on the State's motion, Mary was called as a witness by the court but she refused to answer questions on the ground that such answers might be incriminating to her. The State Attorney attempted to grant her immunity from prosecution in an effort to secure her testimony but she persisted in standing upon her Fifth Amendment rights.

Under the circumstances it is apparent that the delay did not prevent Mary from testifying for the petitioner at the trial. Even if the case would have been tried when it was first set, that is, one and one-half months after the petitioner's arrest, it would have been possible to impeach Mary's testimony with two prior inconsistent sworn statements, whichever way she chose to testify. Mary had simply spun such a tangled web of prior statements that she could not risk testifying, and the delay did not materially improve or worsen the situation.

Petitioner contends that he was prejudiced by virtue of the fact that Edwards died in the period of time between his arrest and the trial. This contention is totally without merit. Edwards lay gravely wounded at the time the murder indictment was returned against the petitioner and he died some two weeks after petitioner's arrest. Therefore, the period of delay in bringing the case to trial had no effect on the availability

of Edwards.

Petitioner's final contention is that the passage of time between his arrest and trial caused Padgett's memory to fade concerning the events which occurred on the night of January 11, 1967. Padgett was called as a State's witness at the trial. He testified with clarity concerning some of the events but stated he couldn't remember others because "it had been too long".

The trial judge ruled that Padgett was a hostile witness and permitted the state to cross-examine him, at which point he invoked the Fifth Amendment and the questioning was concluded. It appears that the witness' loss of memory was a result of convenience rather than the passage of time between petitioner's arrest and trial, and we are unable to find prejudice on this ground.

In light of all the foregoing facts it must be concluded that the petitioner was not prejudiced by the inordinate delay which occurred in the bringing of his case to trial, and that he was not denied the right to a speedy trial on the murder charge of which he now stands convicted.

The petitioner's Petition for Writ of Habeas Corpus is therefore denied.

DONE and ORDERED in chambers in Orlando, Florida, this 28th day of March, 1972.

RICHARD M. DUNCAN
UNITED STATES
SR. DISTRICT JUDGE

Copies mailed to:

Mr. Harvey D. Arrant
Florida State Prison
P. O. Box 221
Raiford, Florida 32083

Mr. James L. Padgett
Pitts, Eubanks, Ross & Rumberger
P. O. Box 20154
Orlando, Florida, 32814

Mr. P. A. Pacyne
Assistant Attorney General
419 Stovall Professional Building
305 Morgan Street
Tampa, Florida 33602

BY MR. PACYNA:

Q The question was whether or not you were ever in Birmingham, Alabama in 1967.

A No, sir.

Q Never in Birmingham?

A No, sir.

Q Did you ever have any kind of a trial in 1967 for any charge of a Federal crime?

A No, sir.

Q Did you ever have a trial in 1968 for a Federal crime?

A Yes.

Q And what was the Federal crime?

A Illegal untaxed moonshine whiskey.

Q Where were you arrested for this charge?

A In Enterprise, Alabama.

Q What year was that?

A This was 1967.

Q 1967?

THE COURT: '67?

THE WITNESS: I am pretty sure because I was tried in June of '67 for the crime.

BY MR. PACYNA:

Q Was this after you were out on bail from the murder charge in Florida?

A Yes.

Q Where were you tried for this crime?

A Dothan, Alabama.

Q Was that trial in 1967 or 1968?

A This trial was in 1968.

Q Do you remember the month?

A No, sir.

Q Were you ever incarcerated in a penitentiary institution for this crime?

A Well, the illegal whiskey?

Q Yes.

A Yes.

Q At what institution?

A Federal penitentiary.

Q Where?

A Atlanta, Georgia.

Q When?

A They admitted me, they put me in on the 4th of June, if I remember correctly, the 4th of July, June, 4th of June, 1968.

Q How long did you stay in the federal penitentiary from June 4, 1968?

A Approximately eight months.

THE COURT: Illegal sale of liquor or illegal manufacture of --

THE WITNESS: Possession, Your Honor.

THE COURT: Possession?

THE WITNESS: Possession of illegal untaxed moonshine whiskey.

BY MR. PACYNA:

Q After you were admitted to bail, sir, in 1967 in Florida on the charge for which you were indicted in Orange County, murder, were you ever arrested on any other charges in the State of Florida?

MR. PADGETT: Your Honor, again I am going to object to this line of questioning. I don't see the relevancy of any extraneous crim-

inal activity that this man has been involved in with regard to -- the relevancy of that as to whether the State afforded him a speedy trial in this particular case that we are concerned with.

The authorities are clear that the fact that a person is incarcerated in a foreign jurisdiction is no excuse for not bringing him to trial in the accusing jurisdiction. That is just as clear as it can be, and I would cite a series of cases to the Court.

This line of questioning regarding his criminal activity, charges and incarceration in other jurisdictions is totally irrelevant to the issues in this case.

THE COURT: Very well. We'll hear it. Overruled.

BY MR. PACYNA:

Q Do you remember the question?

A Yes, sir.

Q Do you care to give us an answer? Were you arrested for any other crimes after you were admitted to bail on the murder charge in Florida?

A Yes.

Q When?

A I don't know when. I have no education. I don't remember numbers.

Q Was it after you were admitted to bail in Florida but before you went back to Birmingham, Alabama or to Alabama?

A Yes, if I remember correctly. Now, I couldn't be sure of this.

Q In what city in Florida were you arrested?

A Walton County.

Q On what charge?

A Ex-felon being in possession of a firearm.

Q Were you tried on that charge?

A No, sir.

Q Was this in 1967 that you were arrested or 1968?

A This was in, this was Christmas of 1967.

Q Were you admitted to bail on this charge?

A Yes, sir.

Q After you were admitted to bail in December of 1967 was it then that you

went to Alabama?

A I was always going to Alabama. I live right to the line and I do all of my trading in Alabama.

Q You have alleged in your sworn petition for writ of habeas corpus that between the time that you were arrested in 1967 for murder and the case which is the subject matter of this hearing, and the time of your trial in 1969, that you were prejudiced because you were denied a speedy trial.

* * * * *

BY MR. PACYNA:

Q What occurred between January of 1969 and March of 1969 leading up to the trial as far as your personal knowledge is concerned?

MR. PADGETT: Again I would ask the question be made more specific. I object to it.

THE COURT: Overruled.

THE WITNESS: There was pending on behalf of Mr. Arrant a motion for discharge based on the failure of the State to afford him a trial according to the Statute then in force which provided that to secure a trial within three terms of court a Defendant could file

this notice within three consecutive terms of court.

That motion was argued before Judge Barker and Judge Barker ruled that the Defendant did not comply with the Statute then in force, and that has been upheld by the Florida Appeals Court.

Nevertheless, a trial date was set in March and he was put to trial, the verdict coming in, I believe, on March 19, 1969.

Now, in preparation for that trial I subpoenaed all of the witnesses known to me, and I caused a Writ of Habeas Corpus Ad Prosequendum to be issued.

And in working with the Federal authorities in Atlanta and the United States Marshal's office we objected the transfer of Mr. Arrant from the Federal Penitentiary in Atlanta to the Orange County jail for the purpose that we might present him for trial.

Following the verdice (sic) he was returned to the Federal Penitentiary in Atlanta to serve out the remainder of his sentence after which time he was then transported to the State Penitentiary at Raiford.

A P P E N D I X IV

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72-2207

Summary Calendar*

HARVEY D. ARRANT,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT, Director,
Division of Corrections, State of Florida

Respondent-Appellee.

Appeal from the United States District
Court for the Middle District
of Florida

(October 24, 1972)

---

*Rule 18, 5 Cir.; See *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

Before BROWN, Chief Judge, GOLDBERG and MORGAN, Circuit Judges.

MORGAN, Circuit Judge: This appeal raises one of the most difficult issues which may arise concerning the Constitution and the criminally accused defendant. Appellant Harvey Arrant was convicted of murder in the first degree on March 19, 1969, in the Circuit Court of Orange County, Florida, and sentenced to life imprisonment. Appellant now challenges this conviction, urging that his right to a speedy trial under the Sixth Amendment to the United States Constitution was clearly abrogated by the State of Florida. After a careful study of the record in this case, this court is compelled to agree.

I.

This case is before this court on appeal from the denial of a petition for a writ of habeas corpus by the United States District Court for the Middle District of Florida. Appellant had previously sought to press his claim of denial of a speedy trial in the Florida courts. Relief was denied. *Arrant v. State*, 234 So.2d 167 (4th DCA Fla., 1970). After exhausting all state remedies, appellant turned to the federal courts.

II.

In the recent case of *Barker v. Wingo*, 40 L.W. 4840 (June 22, 1972) a unanimous Supreme Court,speaking through Mr.Justice

Powell, sought to set out the criteria by which the speedy trial right was to be judged. The court recognized the great difficulty in adjudicating the claim of denial of a speedy trial and pointed out the need for balancing the competing interests involved through a detailed functional analysis of the factual situation. In attempting to provide guidelines, the court stated:

> A balancing test necessarily compels courts to approach speedy-trial cases on an *ad hoc* basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. 40 L.W. at 4845.

Our discussion of the merits of appellant's claim will be organized around these suggested categories. Specific factual matters will be more relevant when discussed with the element on which they bear. At the outset, however, it is necessary to have a general overview of the facts, including the circumstances giving rise to the murder charge.

On March 30, 1967, an Orange County grand jury indicted appellant for the murder of one Kenneth Benson. On January

11, 1967, appellant, Mary Peak (a/k/a Mary Peak Arrant), Donald Edwards, and Joe Padgett arrived in Orlando and rented a room at the Log Cabin Motel. The testimony indicates that the group intended to lure someone with money into a card game.

Late that evening, appellant, Mary Peak, and Donald Edwards left the motel and went to a local eating place. They entered separately, with appellant and Edwards sitting together. The murder victim, Kenneth Benson, later joined Mary Peak. According to testimony, appellant and Edwards followed Peak and Benson to another restaurant and left when they left.

Testimony shows that appellant, Peak, Edwards, and Padgett left the motel around 2:00 A.M. on January 12, 1967. Around 2 o'clock that afternoon, Benson's body was found in his car on a lane near the motel. Time of death was fixed at about 1:00 that morning.

Around the end of January, 1967, Donald Edwards was seriously wounded in a gun battle unrelated to this case. He died after some 83 days of hospitalization.

On February 24, 1967, Mary Peak gave a sworn statement to Orange County officers implicating appellant and Edwards in Benson's death. Appellant was indicted on March 30, 1967. Mary Peak testified before the grand jury, allegedly again incriminating appellant and Edwards, but

there is apparently no competent record evidence of her testimony. On April 13, 1967, Mary Peak gave a sworn statement to appellant's attorney which exonerated appellant in the death of Benson. On May 1, 1967, Mary Peak gave sworn testimony again exonerating appellant at a habeas corpus hearing following which appellant was released on $2500 bond.

Trial was set for May 8, 1967. On May 3, 1967, the state was granted the first of several continuances. Appellant was finally brought to trial, after several demands and some questionable maneuvers by the state, on March 17, 1969.

III.

Length of the Delay

The length of the delay is primarily a "triggering mechanism" for a full inquiry into circumstances giving rise to the speedy trial claim. *Barker v. Wingo*, supra. The almost two-year gap from indictment until trial in this case is clearly sufficient to require serious consideration of appellant's claim. We now turn to the other elements involved.

Reasons Asserted for the Delay

As noted, on May 3, 1967, the state was granted a continuance in this case following its assertion of the need for more time due to the inconsistent statements of Mary Peak. There was apparently no objection by appellant and trial was

reset for June 12, 1967. On June 1, 1967, the state requested another continuance, citing the death of Donald Edwards and the change in Mary Peak's testimony. Again there was apparently no objection and the trial was reset for October 16, 1967. The record and briefs are not clear as to exactly what transpired on that date but appellant, though present and allegedly ready to defend, was definitely not tried. The record does not contain an order granting a continuance or setting a new trial date. It is apparent, however, that the state was granted another continuance, with no reason therefor established by the record. No new trial date was set.

Beginning in January, 1968, appellant filed a series of four petitions demanding a trial. Apparently no action whatsoever was promptly taken on these requests. Finally, in November, 1968, petitiioner's appointed attorney petitioned the court for release and payment. At the time this petition was granted, the court apparently did not directly consider appellant's request for dismissal for lack of a speedy trial. In its order dismissing the appointed attorney, however, the state court noted that the appellant had made application for a speedy trial and that

> the State of Florida by and through Arthur L. Steed, State Attorney for the Ninth Judicial Circuit, has announced that *the State would be unable to successfully prosecute the*

> *defendant at the present time or in the reasonable forseeable future* ... (emphasis supplied).

Despite this statement, and despite the fact that appellant's attorney was discharged, the indictment against appellant was not dismissed nor was any trial date set for him.

Finally, following the election of a new state attorney, a trial date was requested by the state on January 19, 1969, and trial was set for March 17, 1969.

In assessing the reasons asserted for the delay, it seems clear that the alleged change in the testimony of Mary Peak would be sufficient to justify some reasonable delay in the trial so that the state could further investigate the situation and possibly prepare a case for her impeachment. This, however, begins to seriously weaken as a justification after the October, 1967, trial was postponed. The state cannot use this sole excuse to indefinitely postpone trial.[1]

---

[1] Furthermore, this court wonders at the strength of this ground in light of the testimony of the new state attorney who tried the case at the *habeas* hearing below in the district court. In response to a question from the district court as to how, in light of the continuances for lack of evidence, the case was finally proved, the state attorney stated: "Judge, we proved it by bringing in every single shred and

> scrap of circumstances we could. We proved this case beyond any reasonable doubt without the testimony of Mary Peak".

The death of the possible witness participant Donald Edwards is not very convincing as a justification for the lengthy delay. He was not available before the grand jury which indicted appellant nor is there any evidence that the state had reasonable expectation that it would in any way benefit from testimony he might give.

Therefore, it seems that little if anything was left of either of these asserted justifications after the October trial was aborted. What reason is then to be assigned to the almost fifteen-month delay from this time until a trial date was even requested by the state? The obvious answer is, remarkably, the one given by the state at the hearing below. The state attorney who handled this case quite candidly stated to the district court under oath that he kept putting off trial because he "did not want to see him [appellant] be acquitted of this crime". Thus, this is the only viable excuse for the delay that this court will accept for the period after October 16, 1967. Needless to say, this court finds this asserted justification extremely unsatisfactory and will weigh this element heavily in the ultimate determination of appellant's claim.

Defendant's Assertion of the Right

As previously noted, appellant first made a demand to be tried on January 5, 1968. Other motions to the same effect were filed on February 6, 1968, and March 7, 1968. The record does not show any response at all from either the state or the court to these demands. Again on October 1, 1968, appellant filed another demand. This, too, was never directly addressed, although there was apparently some consideration of the speedy trial claim at the hearing in November, 1968, as previously discussed.

In *Barker v. Wingo*, supra, the Supreme Court treated fully the importance which attaches to an accused's demands for a speedy trial. It also went deeply into the question of waiver of the right. We find the arguments for waiver made in this case by the state to be totally unconvincing. Contrary to the state's claim, the appellant here was not "continually waiving his rights". Appellant began to demand trial within ten months of his last indictment and within three months of the last trial date which had been set for his case. After the first continuances, there was really no need to make a demand since the trial judge undertook to set a new date for trial in

the relatively near future.[2] However, after the continuance *sine die* in October, and after no date for trial was set soon thereafter, appellant quickly began active assertion of his right to a speedy trial. We find this to be a most timely and reasonable exercise of the demand right. The appellant repeatedly put the state on notice that he desired to be tried, beginning over a year before the state ever requested a trial date.

While timely demand is an important element, we feel that the response of the state to such demands is also a matter of prime importance. Here the record shows only silence, or at worse, deliberate inattention, by both the court and the state to appellant's repeated demands. As noted, the only response finally given by the state at the November 1968 hearing was to the effect that it might well never be ready to try appellant.

At this point, appellant has presented a strong prima facie case that his

---

[2] The record is not clear as to what arguments of counsel were presented at the early continuance hearings. Even if appellant did not object to the continuances, we do not find that of great significance at these early stages, especially since the state had clearly reasonable justification for the first two.

Sixth Amendment right to a speedy trial was violated by the State of Florida. One last element remains to be considered.

Prejudice from the Delay

The last element to be weighed in the balance is the impact which the otherwise unjustified delay may have had on appellant and the defense of his case. In *Barker*, the Supreme Court recognized essentially three subcategories of prejudice against defendants which could arise from the denial of a speedy trial: (i) oppressive pretrial incarceration; (ii) anxiety and concern of the accused; (iii) impairment of the defense.

The record in this case demonstrates that appellant was incarcerated for only a short time. Following the *habeas corpus* proceeding at which Mary Peak testified in his behalf, appellant was released on $2500 bond. Thus, this harm was not present here.

Secondly, there is the problem of anxiety and concern of the accused. This is, of course, present to some degree in virtually every case. Undoubtedly, it is quite severe in a capital case such as this where, at the time, appellant was faced with the possibility of the death sentence if convicted.

Finally, we come to the most important type of prejudice which must be considered—factors which operate to

lessen the accused's ability to present his defense.

In this case, appellant has pointed to loss of memory by Padgett, who was closely connected with the events in question, as working against his interests. Loss or non-loss of memory is a quite difficult thing to establish. It is true that Padgett did claim a loss of memory several times while being examined. Once he was ruled a hostile witness, however, he repeatedly relied on his Fifth Amendment protection against incrimination. Therefore, this court wonders about the degree to which his memory was indeed affected by the passage of time. Under the circumstances of this case, while we recognize the possible substance of this memory-loss argument, we are not inclined to give it great weight.

There is, however, a far more serious allegation of prejudice in this case. As previously noted, Mary Peak had originally given a sworn statement incriminating appellant and Edwards before appellant was arrested. She also allegedly testified to the same effect before the grand jury, although no competent record of this testimony was apparently preserved. Soon thereafter, Mary Peak issued a sworn statement exonerating appellant (on April 13, 1967) and gave sworn testimony exonerating appellant at the hearing on May 1, 1967, which resulted in appellant's release on bond. This inconsistency was, of course, the

major justification pressed by state in its requests for continuances.

About two weeks after the new state attorney had requested a trial date for appellant, Mary Peak was subpoenaed to appear before the state attorney. The record does not show any other attempts by the state to discuss the change in story with Mary Peak although the court is willing to assume that sometime earlier during the almost two-year period state officials had contacted her. On the date of this appearance before the state attorney, February 12, 1969, Mary Peak was arrested by state officers and charged with perjury regarding the statement she had given the county solicitor in 1967. She was told that her bond would be set at $50,000, which was *twenty* times the bond on which appellant, charged with murder in the first degree, had been at liberty for almost two years.

After a private conference with the new state attorney, Mary Peak issued a new affidavit which stated that her original statement to the Orange County authorities was correct and that her exonerating statements were not correct. She did not, however, directly incriminate appellant anew in this statement. The state attorney immediately dropped all charges against Mary Peak. There is also testimony that a state officer offered to help her get a job and would give her a place to stay and have her baby cared for while she worked in

exchange for testimony against appellant. Testimony by state officers at the hearing below substantially established the accuracy of these actions by the state.

When called by the state at appellant's trial, Mary Peak, after being provided with counsel, refused to answer all questions, relying on Fifth Amendment rights. The defense, aware of her latest statements to the state attorney, did not call her.

The allegation is clearly that appellant was denied the testimony of an admitted eyewitness to the killing because of the affirmative and highly questionable actions taken by the state attorney during the period that appellant's trial was delayed. It must be remembered that Mary Peak had already once given testimony in court exonerating appellant. In another sworn statement, executed in 1971 after appellant was in prison serving this sentence, Mary Peak again exonerated the appellant, outlined various pressures which she said the prosecution exerted on her, and clearly indicated that she would have testified for appellant had it not been for the actions of the state attorney.

The state asserts that appellant was not prejudiced by the deprivation of this witness at trial. First, the state claims that it could have impeached Mary Peak's testimony through the use of her inconsistent statements. This is definitely not a matter within the state's

power to unilaterally decide. From the record of testimony below it is clear that Mary Peak was a strong witness. One state attorney admittedly feared that appellant would have been acquitted before the steps which deprived him of Mary's testimony were taken. While the state seems to rely heavily on this impeachment argument, it is clear that the state was unwilling to proceed against appellant until Mary Peak was completely removed as a possible witness for appellant.

It is appalling to this court for the state to claim that its action which ultimately led to the witness not testifying was harmless since it could have impeached her. Impeachment is a quite tricky exercise. Under our system of criminal justice the ultimate question of credibility is for the jury. Perhaps Mary Peak could have satisfactorily explained the inconsistencies to the jury's satisfaction. Due to the actions of the state, the jury was not given the opportunity to pass on these credibility matters. Had it believed the testimony that Mary Peak would have almost certainly given, appellant would most likely have been acquitted. This is virtually admitted by the state. We shall not sanction unilateral state action which in substance deprives the jury of its right to determine credibility by finding that the deprivation of Mary Peak's testimony was harmless due to a claim of impeaching evidence.

Finally, the state blandly asserts that it was not the delay, but rather the fear of perjury and possible self-incrimination which deprived appellant of the testimony of Mary Peak. This overlooks the activist role taken by the state in causing the deprivation of this testimony. Mary Peak had already once testified in court that appellant was innocent. While all of her statements may have been sworn, this was the only one made in the open before a court of law. We are convinced that under the totality of circumstances in this case, the state took advantage, active advantage, of its own self-generated delay to the detriment of appellant's defense.

We shall not indulge in lengthy speculation as to precisely what role the delay played here. Perhaps Mary Peak's situation had changed so that the procedures used by the state were more effective now than they would have been earlier; perhaps the passage of time and the threat of dismissal under Florida's "three terms of court" rule was what led the state to engage in such drastic tactics; or perhaps it was merely that time allowed for the election of a new prosecutor who was not reluctant to use practices which raise most serious questions of propriety. In any event, it seems clear that had appellant been brought to trial quickly, without the intimidation later practiced, there was a very great chance that the jury would have found him innocent.

IV.

Having discussed the various factors which are vital to the determination of whether the appellant has been afforded the requisite ~~speedy~~ trial, we feel that appellant's conviction must be vacated and that he must be released. This is not a step which this court takes lightly. Appellant was charged with a serious offense and the rights of society must be carefully considered. On the other hand, the very serious nature of the charge is another factor for requiring a speedy trial so that the rights of the accused can be fully protected. This appellant was sentenced to spend the rest of his natural life in prison. There is, as previously pointed out, great doubt that, had it not been for the delay and the intervening events, he would have been convicted. This is precisely the precious element of human freedom which the Sixth Amendment was designed to protect.

Throughout the proceedings involved in this case the State of Florida demonstrated a callous disregard for the rights of this appellant. Appellant has been able to satisfy this court that he prevails on each of the factors which *Barker v. Wingo* throws into the balance. We are especially concerned that after a reasonable time had passed the state did not answer his demands or attempt to justify the continued delay. This court fears the day when any arm of our government is allowed to keep an individual under

indictment for an extended period merely because it fears that were he brought to trial, he would be found not guilty.

REVERSED and REMANDED WITH DIRECTIONS.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72-2207 *
Summary Calendar

HARVEY D. ARRANT,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT, Director, Division of Corrections, State of Florida,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Florida

---

November 15, 1972

ON PETITION FOR REHEARING

Before BROWN, Chief Judge, GOLDBERG and MORGAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.